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CC-19-2019-P-136
Jefferson County Circuit Clerk
Laura Storm

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

NANCY SINGLETON CASE and
DEBORAH A. MCGEE,

Individual Contestors Below, Petitioners,

v. **Civil Action No. 19-P-136**

HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
CHRISTIAN PECHUEKONIS,
MARJORIE FLINN YOST,
BARBARA HUMES,
JAY PREMACK, and
CORPORATION OF HARPERS FERRY,

Individual Contestees Below, Respondents.

RESPONDENTS HARDWICK SMITH JOHNSON, CHARLOTTE WARD THOMPSON, MARJORIE FLINN YOST, AND BARBARA HUMES'
JOINT RESPONSE IN OPPOSITION TO THE PETITON FOR APPEAL

The Petitioners ask a lot of this Court. Reverse the trial court's findings of fact. Rely on evidence not in the record. Ignore long-established Supreme Court precedent. Apply, instead, what one of the Petitioners' witnesses called "the spirit of the law."

The Respondents, on the other hand, ask only that the Court apply the law as it is written.

Looking past the rhetoric, the law compels a straightforward result. The trial court's findings of fact are well supported by the evidence (or lack thereof). They are certainly not arbitrary, capricious, or clearly wrong. This Court must therefore accept the trial court's findings that, among other things: (1) there was no competent evidence establishing Voter Howell's actual residence in Harpers Ferry with intent to remain indefinitely; (2) there was insufficient

evidence concerning the source, nature, or cause of the alleged "DMV error"; and (3) that none of the provisional voters were in the Harpers Ferry Poll Book on the day they cast their ballots.

Applying these facts, the trial court's legal conclusions are well-grounded in established law. Without evidence of residency, Voter Howell's ballot cannot be counted. Without evidence of the nature of the alleged registration error, nor can the Town count the ballots of any of the other provisional voters. And even if the registration error occurred exactly as the Petitioners speculate, the Supreme Court has already decided that such circumstances do not amount to a "technical error" that can be overlooked. Finally, the Respondents not only acted appropriately by rejecting the Petitioners' attempts at strategic disqualification, but did only what the law required them to do.

For these reasons and those set forth more fully below, the trial court's order should be affirmed.

BACKGROUND

This appeal from a statutory election contest trial pits two losing candidates for the Harpers Ferry Town Council—Nancy Singleton Case and Barbara McGee—against those who prevailed in the election—Hardwick Johnson, Charlotte Thompson, Christian Pechuekonis, Barbara Humes, and Jay Premack.[1] Their challenge is being financed by individuals affiliated with a special interest group devoted to developing a new resort on historic property within the Town of Harpers Ferry. Appx. 169–70 & 229 (Exhibit 7).[2]

Case and McGee lost the election by two and three votes, respectively. At the post-election canvas, the Town Council, sitting as a Board of Canvassers, considered six provisional

1 The Petitioners also named Marjorie Flinn Yost, a fellow losing candidate, as a Contestee.

2 References to "Appx." are citations to the appendix filed by Petitioner in this matter.

ballots. Constrained by law to the evidence appearing on the face of the ballots, and guided by the Secretary of State's 2019 Best Practices manual, the Board voted to reject the provisional ballots because the voters' names did not appear in the Harpers Ferry Poll Book. Appx. 002.

On June 19, 2019, the Board of Canvassers met to certify the results of the election. At this meeting, Recorder Kevin Carden asserted that Case and McGee had requested a recount. Despite his assertion, Carden failed to produce any written evidence that the Petitioners had made such a request, or that they had posted the bond required by law. Nonetheless, based on Carden's representations, the Board delayed certifying the election in order to conduct a recount, which occurred on June 26. When the recount did not change the results, the Board formally certified the election results on June 28. Appx. 002.

The underlying election contest was filed on July 8, 2019. Initially, the Petitioners claimed not only that the provisional ballots should have been counted, but that a number of ballots that *were* counted should have been thrown out. Appx. 002, 061–66. Eventually, many of those (apparently unfounded) challenges were completely abandoned.

The election contest trial was held on August 24, 2019. Appx. 003. By then, the Petitioners' case had been whittled down to the claim that the Town Council should have counted the votes of five provisional voters: Linda McCarty, George McCarty, Adam Hutton, Leah Howell, and Jane Mumaw. Before the first witness was sworn, however, the Petitioners also dropped their claim as to Voter Mumaw (who happened to share an address with Recorder Carden). Appx. 083.

The Petitioners' opened their case by stipulating that none of the provisional voters' names appeared in the Harpers Ferry Poll Book on the day of the election. Appx. 083. They then turned to the testimony of Jefferson County's deputy county clerk, Nikki Painter. Ms. Painter

testified that she was first made aware of the dispute over the provisional ballots when she was contacted by Recorder Carden. Appx. 091. In their brief, the Petitioners rely on Ms. Painters' testimony to try to establish the nature of the so-called "technical error" that they believe caused the provisional voters' names to be omitted from the poll book. Ms. Painter's testimony on this front, however, was limited entirely to hearsay and speculation that the error was caused by some unspecified "mistake" on the part of the DMV. Appx. 092–93.[3] And under cross-examination, she conceded that she had no idea what the "technical error" actually was, who caused it, when it occurred, or why it occurred. Appx. 104–05. Indeed, neither she nor anyone in her office ever even attempted to contact anyone at the DMV. Appx. 103. As a result, she "[could not] speak to what happened at the DMV," at all. Appx. 104.

The remainder of the Petitioners' case-in-chief consisted of the testimony of three of the four provisional voters. George and Linda McCarty each testified that they lived in Harpers Ferry and intended to stay there indefinitely. Appx. 118, 138. They also told the trial court about the difficulties they encountered while registering to vote in July of 2018. Though they blamed the DMV, they admitted to knowing all along that they had not registered using the correct address. Appx. 125, 139.

Next, provisional voter Adam Hutton (reluctantly)[4] testified that he was a permanent resident of Harpers Ferry. Rather than blaming the DMV for his absence from the poll book, however, Mr. Hutton told the trial court that he felt that it was "his responsibility to make sure [his] registration was correct." Appx. 152.

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[3] Contrary to the Petitioners' suggestions otherwise, Pet. 7, Ms. Painter was never proffered much less accepted by the trial court as an expert witness on any subject.

[4] According to Mr. Hutton, he was subpoenaed by the Petitioners and did "not particularly" want to testify. Appx. 151.

The Respondents then rested their case without calling Voter Leah Howell or adducing any evidence whatsoever about her eligibility to vote.

For their part, the Respondents called Petitioners Case and McGee, who testified, among other things, about whether they fulfilled the necessary legal prerequisites for filing an election contest. Appx. 160–76. The Respondents also attempted to call Recorder Carden. Appx. 177. When the Petitioners objected on the basis of relevancy, the Respondents' counsel proffered that Painter's testimony established Carden's role as a fact witness to the process of "correcting" the registration errors, and that the testimony of Case and McGee revealed that Carden had unique knowledge necessary concerning the Petitioners' standing to bring this election contest. Appx. 178–79. Nonetheless, Carden refused to take the stand or otherwise answer any questions.

The parties thereafter offered closing statements and the Town Council sitting as the trial court adjourned to deliberate. On September 11, 2019, the trial court entered findings of fact and conclusions of law deciding that the four provisional ballots could not be counted under West Virginia law. Appx. 001–12. This appeal follows.

STANDARD OF REVIEW

This Court is sitting as an appellate court to review of the decision of the Town Council for the Corporation of Harpers Ferry, which acted as the trial court in resolving the election contest initiated and tried by Petitioners under West Virginia Code § 3-7-6. *See* W. Va. Code § 3-7-7 ("When such appeal is taken to the circuit court, . . . it shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by the county court, and the circuit court shall decide the contest upon the merits.").

On review under its appellate jurisdiction, this Court "must give the [Town Council's] factual determinations the same sort of deference that appellate courts generally give to fact-

finder tribunals—disturbing such determinations only when they are arbitrary, capricious, or clearly wrong." *State ex rel. Bowling v. Greenbrier Cty. Comm'n*, 212 W. Va. 647, 649, 575 S.E.2d 257, 259 (2002); *see also* Syl. Pt., *id*. (holding that a circuit court may not "disturb findings of fact on conflicting evidence unless such findings are manifestly wrong or against the weight of the evidence.") (quoting Syl. Pt. 6, *Brooks v. Crum*, 158 W.Va. 882, 216 S.E.2d 220 (1975)). Questions of law are reviewed *de novo*. *See id*., 212 W. Va. at 649, 575 S.E.2d at 259.

ARGUMENT

I. The Town Council correctly concluded that the four contested ballots could not be counted under governing law.

A. The Petitioners had the burden of proof.

As the parties challenging certified election results, the Petitioners bore the burden of proof and persuasion. *See State ex rel. Bumgardner v. Mills*, 132 W. Va. 580, 601, 53 S.E.2d 416, 430–31 (1949) ("Whatever is done by persons exercising a legal authority is presumed to be done rightly. The burden of overcoming this presumption of the regularity of all these ballots as indicated by the face of the election returns was upon the petitioner.") (internal quotation marks and citations omitted); *see, e.g.*, *Maynard v. Hammond*, 139 W. Va. 230, 238, 79 S.E.2d 295, 299 (1953) ("The burden was upon contestant to prove by a preponderance of the evidence that the election in Precinct No. 4 was so fraudulently conducted that the entire vote cast there should not be considered."); *State ex rel. Staley v. Wayne Cty. Court*, 137 W. Va. 431, 437, 73 S.E.2d 827, 831 (1952) ("The rule just stated applies in this instance, and under the rule it will be presumed, in the absence of evidence to the contrary, that the county court sitting as a board of canvassers actually did ascertain and declare the results of the primary election.").

B. The Petitioners did not satisfy their burden to prove that each of the four provisional voters satisfied the legal requirements to have their ballots counted.

West Virginia law specifies that a person's ballot may not be counted unless he or she meets two requirements: (1) he or she is a "resident" of the municipality and (2) he or she is eligible and "duly registered" to vote in that municipality. *See* W. Va. Const., art. IV, § 1; W. Va. Code § 3-2-1(c); *see also id.* § 3-2-2(a). If a person is either not a resident *or* is not properly registered in a municipality, then his or her vote cannot count in an election in that municipality.[5]

1. Residency requirement. In order to cast a valid and countable vote, a person must satisfy the residency requirement. Not only must a person be a resident of West Virginia, but that person must also be a "bona fide resident" of the county and "municipality in which she or she offers to vote." *See* W. Va. Code § 3-1-3; *see also* W. Va. Const., art. IV, § 1. In addition, a voter must be a resident of a municipality at the time of casting a ballot and for a 30-day period before casting a ballot. *See* W. Va. Const., art. IV, § 1; *Ellis*, 153 W. Va. at 51 (equating "offer[ing] a vote" with "cast[ing]" a ballot); W. Va. Code § 3-1-3.

In order to be a resident of a municipality—for purposes of casting a vote—a person must have a physical presence in that municipality and intend to remain there for the foreseeable future. *See White v. Manchin*, 173 W. Va. 526, 538 (1984) (equating, for purposes of election law, residence with domicile, which has two elements "(1) [b]odily presence in a place [and] (2) [t]he intention of remaining in that place"); *see also* Syl. pt. 7, *State ex rel. Peck v. City Council*

[5] Because Harpers Ferry has adopted a permanent voter registration system pursuant to Article 2 of Chapter 3 of the West Virginia Code, the provisions of that article apply to this election contest. *See State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 52 (1969) (applying provisions of permanent voter registration code to municipality that adopted it); *see also* Harpers Ferry, W. Va., Ordinances ch. 1, art. 103, § 103.04 (2019) (adopting permanent voter registration law of West Virginia).

of City of Montgomery, 150 W. Va. 580 (1966) (explaining residency requirement and applying domicile rule to municipal election).[6]

Therefore, if someone was not a resident for the 30-day period immediately before casting a ballot or was not a resident at the time he or she cast a ballot, then that person's vote cannot be counted under West Virginia law. *See Peck*, 150 W. Va. at 588 (concluding that residency requirement contained in Article IV, section 1 of West Virginia Constitution "applies to cities").

2. <u>Voter registration requirement</u>. In addition to being a resident of the municipality, a voter must also meet voter registration requirements in order for that person's vote to count. *See* W. Va. Code § 3-2-1; *see also* W. Va. Const., art. IV, § 12 ("The Legislature shall enact proper laws for the registration of all qualified voters in this state."); *State ex rel. Willhide v. King*, 126 W. Va. 785, 789 (1944) (concluding that § 12 of Article IV of the Constitution was "sufficient to warrant" enactment of voter registration requirements).

There are three voter registration requirements relevant to this contest: (1) a person must be "eligible" to register to vote, *see* W. Va. Code § 3-2-1(c); (2) a person must be "duly registered" to vote, *see id*.; and (3) a person must be properly registered not later than twenty-one (21) days before the election in question. *See id*. at § 3-2-6(a) (setting the deadline for voter registration). A voter must satisfy *each* of those three requirements in order for his or her vote to count. The purpose of these registration requirements is to enable election officials to determine whether someone satisfies the constitutional and statutory qualifications before he or she actually casts a ballot. *See State ex rel. Daily Gazette Co. v. Bailey*, 152 W. Va. 521, 525 (1968) (explaining that registration statutes "protect . . . the ballot box").

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6 *See also* W. Va. Code § 3-1-3; W. Va. Const., art. IV, §1 (requiring a permitted voter be a "resident"); W. Va. Code § 3-2-2 (mandating that a person must be "a legal resident" of location in order to register to vote).

A person is only "duly registered" for a municipal election when his or her registration shows that he or she resides in the municipality. Under the West Virginia Code, "duly registered" means that a person is registered to vote in the location holding the election. As applied to a municipality, the Supreme Court of Appeals of West Virginia has determined that a "duly registered" voter "must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides." *See Ellis*, 153 W. Va. at 52.

In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records—when he or she casts a ballot, then that person's vote cannot count in an election of that municipality. *See* Syl. pts. 2 & 3, *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446 (1949). Because of the importance of such residency information, when a person fills out a voter registration application, he or she must identify the address, city, and county where he or she resides *under oath*. *See* W. Va. Code § 3-2-5(c)(3). A person must be duly registered to vote by the registration cutoff date, which is 21 days before the election. *Id.* § 3-2-6(a).

Therefore, if a voter had not registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be duly registered to vote in that election. *See Ellis*, 153 W. Va. at 52 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election); *Lawhead*, 129 W. Va. at 172 (applying former version of code that contained 30-day cutoff period and concluding that "[i]t is plain that in order to vote at an election a person must be registered thirty days or more prior to

that election"). In other words, that person's vote cannot not be counted in that municipal election. [7]

a. The Petitioners failed to present competent evidence to support their allegation that the provisional ballot of Voter Howell should be counted.

Above all else, this Court must sustain the Town Council's decision not to count the ballot of Voter Leah Howell because the Petitioners failed to adduce any evidence at trial that she "resided" — as defined by statute and Supreme Court precedent — in Harpers Ferry at the time of the election.

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[7] The Secretary of State filed a motion to intervene or for leave to file an attached amicus brief. While Respondents have no objection to the filing of the proposed amicus brief, the Secretary's motion fails to explain or even cite to the legal requirements for proper intervention as a party, and so that request should be denied.

On its merits, the Secretary's two-page amicus brief lacks persuasive force. *First*, the Secretary takes the position that the 2004 rollout of the centralized state voter registration system silently displaced the need for registration to a certain municipality in order to vote there. The Secretary appears to argue that that system apparently altered the Code's meaning of "duly registered," without expressly doing so. *See* W. Va. Code § 3-2-1(c) (requiring that a person must be eligible to vote and "duly registered" in order to be permitted to vote in an election of a state subdivision). That is, the Secretary asserts that "a voter is duly registered to vote in their home municipality if they are duly registered in the single state voter registration system." Br. at 2. In so asserting, the Secretary both misapprehends the statutory "duly registered" requirement and essentially reads that requirement out of the Code.

As explained, to be duly registered, a voter must be registered *to a municipality*. *See State ex rel. Ellis v. Cnty. Court of Cabell Cnty.*, 153 W. Va. 45, 52 (1969) (explaining that a "duly registered" voter "must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides"). *That means that the registration must actually reflect that they reside in the municipality.* The Secretary, however, argues that a potential voter must only actually *reside* in a municipality and be registered to vote *anywhere* in the State of West Virginia. But that residency requirement goes to "eligibility," which is a different and separate statutory requirement that a voter must meet in order to place a countable vote. *See* W. Va. Code § 3-2-1(c). The position advocated by the Secretary would, in essence, *delete* the "duly registered" requirement from Code. In so doing, the Secretary would make it such that, except for purposes of statewide elections, the voter registration system would be effectively meaningless. That is, the Secretary contends that as long as someone lives in the municipality and is registered in the State generally, their vote should count. Such a system would mean that people could jump from municipality to municipality and never change their registration, which would defeat the purpose of having a registration system. There would be no accurate listing of individuals who are entitled to cast a countable vote. The Secretary's interpretation thus counters the plain text statutory requirements that a potential voter both actually resides in the municipality where he or she seeks to vote *and* that he or she is properly registered as a voter for that municipality.

Second, the Secretary simply asserts that "[t]he allegedly incorrect address of a voter's home" is "clearly" a "technical issue." Br. at 3. Again, the Secretary does not even attempt to grapple with any cases of the Supreme Court of Appeals addressing the statute in ways contrary to the Secretary's position, which ultimately amounts to question-begging.

At the start of the trial, the Petitioners' attorney promised the Town Council that it was "going to hear evidence . . . from Leah Howell." *See* Appx. 083. But that never happened. Unlike Voters Hutton, G. McCarty, and L. McCarty, Voter Howell was never called to the stand.

As a result, unlike the other voters, Voter Howell never testified that she had a physical presence in Harpers Ferry and intended to reside there for the foreseeable future. Nor did any other witness testify that Voter Howell had a physical presence in Harpers Ferry and intended to reside there permanently. Nor did the Petitioners introduce any affidavit, records, or other evidence that Voter Howell had a physical presence in Harpers Ferry and intended to reside there permanently.

The Petitioners' brief fails to acknowledge Voter Howell's absence from the trial and glosses over the lack of evidence with missing, imprecise, or unclear citations to the record.[8] The closest the Petitioners actually come is the testimony of county employee Nikki Painter, who testified that, after becoming aware of problems with other voters' registrations, she "looked at" Howell's registration and "changed" Howell's voter registration from West Washington Street, which is in Bolivar, to Washington Street, which is in Harpers Ferry. But as Ms. Painter admitted, she never actually spoke to Voter Howell, and had no personal knowledge of Howell's actual residency. Appx. 111, 092. As a result, she was unable to offer any competent evidence about whether Voter Howell actually lived in Harpers Ferry on the day of the election and for 30 days before, or whether Voter Howell had any intent to do so for the foreseeable future.

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[8] Throughout their appeal brief, Petitioners rely on uncited "facts" and documents that were not proffered as evidence by the parties to the Town Council as the election contest tribunal. *See, e.g.*, Pet. at 4, 6–7 (assertions as to Voter Howell). This Court cannot consider or rely on them on appellate review. As the Town Council's objection to the contents of the appendix makes clear, quoting the applicable statute, the appeal "taken to the circuit court . . . shall be heard and determined upon the original papers, evidence, depositions and records filed before and considered by" the Town Council as tribunal. W. Va. Code § 3-7-7.

The best—and perhaps only—vehicle for that evidence was Voter Howell herself. The Petitioners knew that; that's why she was on their witness list, and that's why their lawyer told the Town Council she would testify. One can only speculate as to why Voter Howell did not appear at the trial, but regardless of the reason, trials have consequences. The consequence of Voter Howell's absence from this one is that the Petitioners failed to carry their burden of establishing Howell's residency, without which her vote could not legally be counted.

b. The Petitioners failed to present competent evidence to support their allegations that the provisional ballots of Voters Hutton, G. McCarty, and L. McCarty should be counted.

Even if Voter Howell had testified as to her residency, however, two other reasons support the Town Council's conclusion that her provisional ballot could not be counted. These reasons are also why the tribunal was correct in declining to count the three remaining challenged ballots, cast by Voters Hutton, G. McCarty, and L. McCarty.

First, Petitioners failed to adduce any competent evidence concerning the alleged DMV error. Although it made for a good soundbite—blaming the DMV for the voter registration errors—*Petitioners remarkably failed to call any witness from the DMV or present any other competent evidence derived from the DMV.*

Here, Petitioners did not even *attempt* to call a single witness from the DMV to discuss the voter registration process at the DMV; how the DMV computer systems worked (or failed to work properly); how those systems integrated (or not) with the voter registration process; or how the alleged registration errors at issue in this case were actually made (or not made). *See* Appx. 5. Rather, the only evidence purporting to support the "DMV theory" was presented through a deputy clerk from the Jefferson County Clerk's office, who blamed the incorrect registration errors on the DMV. *See* Appx. 092.

But what Petitioners failed to present was any evidence from the DMV concerning the actual source, nature, or cause of the alleged voter registration errors at issue in this contest. Accordingly, Respondents were not given an opportunity to evaluate or cross-examine any such evidence. Worse still, the tribunal was left without the evidence that it would have needed to evaluate and weigh in order to consider whether the disputed ballots could be counted under law.

Second, based on the Petitioners' stipulation that none of the names of the four provisional voters were in fact in the official registration record of the Corporation of Harpers Ferry—the Poll Book—at the time each of them cast their ballots, the ballots cannot be counted in accordance with state law.

The law on this matter is well-settled. As already noted, in order for a vote to count, a voter must be "duly registered" to vote, including at least 21 days before the election at issue. *See* W. Va. Code §§ 3-2-1(c) & 3-2-6(a). A person is only "duly registered" for a municipal election when his or her registration shows that he or she resides in the municipality. Under the West Virginia Code, "duly registered" means that a person is registered to vote in the location holding the election. As applied to a municipality, the Supreme Court of Appeals of West Virginia has squarely held that a "duly registered" voter "must be registered and cast his [or her] ballot in the [municipal] precinct in which he [or she] resides." *See Ellis*, 153 W. Va. at 52. In other words, if a voter is not registered to a municipality—and in the corresponding municipal registration records (aka, the poll book)—when he or she casts a ballot, then that person's vote *cannot* count in an election of that municipality. *See* Syl. pts. 2 & 3, *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446 (1949).

Accordingly, if a voter had not properly registered as residing in a municipality at least twenty-one days before a municipal election, that person would not be "duly registered" to vote

in that election. *See Ellis*, 153 W. Va. at 52 (explaining that ballots could not be counted in precinct that a voter moved to within the cutoff period before the election). In other words, that person's vote cannot not be counted in that municipal election. Given Petitioners' stipulation that none of the four provisional voters' registrations were in the Harpers Ferry poll book at the time of the election, the tribunal was correct in concluding that those ballots cannot be counted.

Third and finally, even assuming sufficient, competent evidence was presented at trial to allow the tribunal to conclude that the registration information of the four provisional voters in fact contained incorrect address information caused by individuals or policy at the DMV that caused those voters not to appear in the Harpers Ferry Poll Book at the time of the election, such incorrect registration errors do not constitute the type of technical error that may be disregarded under law.

This conclusion is compelled by the binding decision of the West Virginia Supreme Court of Appeals in *Galloway v. Common Council of City of Kenova*, 133 W. Va. 446, 57 S.E.2d 881 (1949), which held that the persons whose names appeared on the voter registration records used in county and state elections but not on municipal registration records were not entitled to vote. In that case, the Supreme Court of Appeals *expressly acknowledged* the statutory provision stating that "errors, omissions or oversights" shall be "disregard[ed] . . .if it can reasonably be ascertained that the challenged voter was entitled to vote." *Id*. at 453, 57 S.E.2d at 885 (citing the predecessor statute to current W. Va. Code § 3-1-41(e)). Critically, however, the Supreme Court did *not* apply that provision to the facts of that case to count the challenged votes of voters whose names did not appear to be registered in the municipality of Kenova's poll book.

Instead, the upshot of the *Galloway* decision is that a voter's failure to be properly registered in a municipality, where that municipality has adopted a permanent registration

system, is not a mere technical error that must be disregarded. *See id.* (holding that the "challenged ballots" were not "otherwise valid" and thus not countable "[b]ecause the voters who cast these ballots were not duly registered by reason of the absence of their names from the municipal registration list or record").[9]

As the trial court below acknowledged, Appx. 011 ¶ 64, it was powerless to change the Supreme Court of Appeals' decision in the *Galloway* case, among others, that squarely apply in this contest. Of course, this Court is also bound by the decisions of the Supreme Court of Appeals, for better or worse. Only *that court* can overturn its own precedent, which control in this proceeding. *See State v. McKinley*, 234 W. Va. 143, 149, 764 S.E.2d 303, 309 (2014) ("Our decisions . . . are 'binding authority upon any court' if concurred in by a majority of the justices.") (quoting W. Va. const. art. VIII, § 4).

II. The Rule of Necessity *required* members of Town Council who would ordinarily be disqualified to participate in the election contest hearing to ensure the contest could be heard and adjudicated.

A. The Rule of Necessity is binding law and applies here.

The Harpers Ferry Town Council is the only body that could have judged the Petitioners' election contest. *See* W. Va. Code § 3-7-6 (granting to "the governing body of the municipality" the sole power to "judge . . . any contest of a municipal election"); *see also* Syl. Pt. 8, *State ex rel. Peck v. City Council of City of Montgomery,* 150 W. Va. 580, 582, 148 S.E.2d 700, 703

[9] *See also Brooks v. Crum*, 158 W. Va. 882, 890, 216 S.E.2d 220, 225 (1975) ("It was held in *State ex rel. Willhide v. King* that where persons duly qualified to vote failed to comply with requirements of the statutes concerning registration, which were enacted to prevent fraud in elections, they forfeited their right to the franchise.") (citation omitted).

(1966) ("The municipal council has original and exclusive jurisdiction to hear and decide contested elections involving the selection of municipal officers.").[10]

"The council of a city, town, or village to which one, whose seat is contested, is elected, is the proper tribunal to try such contest, and not the council in office at the time of the election." Syl. Pt. 1, *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S.E. 872 (1919). Therefore, the Town Council that sat in judgment of this election contest included Mayor Wayne Bishop, Recorder Kevin Carden, and Councilmembers Barbara Humes, Hardwick Smith Johnson, Christian Pechuekonis,[11] Jay Premack, and Charlotte Ward Thompson.

In an election contest, individual members of a municipal council that would otherwise be disqualified *must serve* where a quorum is not possible without them. *See State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 591, 148 S.E.2d 700, 708 (1966). That is because "there is no other body to act as a contest board in such cases, and the statute provides that all contested municipal elections shall be heard and decided by the council." *Id*. This is known as the Rule of Necessity. *See Evans v. Charles*, 133 W. Va. 463, 471, 56 S.E.2d 880, 884 (1949); *Price v. Fitzpatrick*, 85 W. Va. 76, 100 S.E. 872, 872–74 (1919); *see also Stafford v. Mingo Cty. Court*, 58 W. Va. 88, 51 S.E. 2, 3 (1905). The *Evans* decision has a lengthy discussion concerning the unusual nature of the Rule of Necessity, but nonetheless requiring it under the precise circumstances faced here.

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[10] Under governing ordinances, the "Town Council" is defined as "the governing body of the town" and "consists of" five Councilmembers, plus the Mayor and the Recorder. Harpers Ferry Ordinance 11.01; *id*. at 11.02. The Mayor and Recorder "have votes as members of the Town Council." *Id*. 111.09.

[11] Unfortunately, Councilmember Pechuekonis refused to participate in the Town Council's hearing and decision of the election contest. Although disqualification is an individual decision in this context, his refusal to participate is contrary to law because the Rule of Necessity required performance of his official duty. Regardless, a quorum still existed without his participation.

Normally, Councilmembers Humes, Johnson, Pechuekonis, Premack, and Thompson would be disqualified because *Petitioners named them as Contestees*. Recorder Carden would also be subject to a disqualifying interest because of his role as a fact witness, as discussed below. Regardless, the Town Council would have lacked a quorum to even *hear* Petitioners' contest without the participation of those individuals. Therefore, the Rule of Necessity mandated that the entire, existing Town Council participate as the governing body to decide the election contest.

The policy of the Rule of Necessity is admittedly unusual. But it is only a rule of last resort, applied so that a body is able to conduct business with all its disqualified members lest no business be done at all. In short, the Supreme Court of Appeals has made the choice that it is better for election contest challengers to be able to have their election contest heard by potentially interested members *than never heard at all*. (Since the Legislature has not yet created an alternative forum to hear such proceedings).

B. Cherry-picked disqualification of contestees has no basis in the law.

Petitioners' argument that only Councilmembers Johnson and Thompson should have disqualified themselves—instead of all councilmembers named as Contestees/defendants—based upon how certain uncounted provisional votes *might* affect the outcome is not supported by any law or case. Instead, it amounts to a tactical attempt to disqualify only *some* members of Town Council in order to maintain a quorum. Again, no case or law supports this calculated and strategic remedy to fashion the Town Council of Petitioners' selective choosing.

Petitioners sometimes rely on and sometimes ignore the statute that provides that *all* named contestees—not just a cherrypicked few—are subject to a disqualifying interest. *See* W. Va. Code § 3-7-6 (a council member "whose election is being contested may not participate in

judging the election, qualifications and returns"). To be blunt, a councilmember is either subject to a disqualifying interest or he or she is not; there is no mushy middle ground. As Supreme Court of Appeals decisions, including those cited above, make clear, if a current member of the governing body is *named* as a contestee in an election contest, disqualification is ordinarily required. That would have been true here, except, as already mentioned, the Town Council would have lacked the power to proceed without the disqualified members, so under binding Supreme Court caselaw, they all *must* participate under the Rule of Necessity.

C. The emailed Ethics Commission staff "opinion" is not inconsistent with Respondents' position.

Petitioners repeatedly invoke the West Virginia Ethics Commission in their attempt to avoid binding precedent of the Supreme Court of Appeals on the Rule of Necessity. This argument is without merit for several reasons.

First, Petitioners' assertion that the "West Virginia Ethics Commission agrees" with their position is misleading. Pet. 15. The Ethics Commission has said no such thing. Rather, a dissenting councilmember contacted a Commission staff person just days before the trial, provided his version of factual information to that staff member, and then received informal advice by email in response. *See* Appx. 032 ("The staff advice rendered herein is based upon the facts provided."). It is undisputed that the Commission itself has not addressed or rendered any actual opinion on this issue. *See id*. ("The Ethics Commission does not have a formal Advisory Opinion which directly addresses this scenario.").

Second, the "staff advice" is not at all inconsistent with Respondents' position. Appx. 032. Respondents *agree* that, ordinarily, any sitting councilmember who is named as a contestee in the election contest—in other words, their election is being challenged—should be disqualified from hearing and deciding that contest. *But* because Petitioners named five sitting

councilmembers as contestees, their disqualifications would have shut down the election contest before it could even begin, since the remaining three members of Town Council would not constitute a quorum to hear and decide the contest. Thus, under binding legal authority, the otherwise interested councilmembers *must* sit in order for a quorum to be available. *See State ex rel. Peck v. City Council of City of Montgomery*, 150 W. Va. 580, 591, 148 S.E.2d 700, 708 (1966). This Court wouldn't know it from Petitioners' appeal brief, but the "staff advice" expressly recognized this very possibility, stating, "I am unable to opine whether a Court may find that *other laws governing municipal elections require council members to serve as a member of an election contes*t." Appx. 032 (emphasis added).

Third, even if the staff advice provided to the dissenting councilmember were contrary to Respondents' view (and it is not), the staff advice is neither controlling or persuasive here, because the Commission (and its staff) are limited to interpreting and applying *the Ethics Act only*. They have no authority or specialty over election statutes or the decisions of the Supreme Court of Appeals applying those laws, including the Rule of Necessity. The staff advice properly acknowledges this fact. *See* Appx. 032–33 (emphasis added) (the staff opinion is "limited to the analysis of whether *the Ethics Act* would be violated by the proposed conduct" and that the "Commission is without authority to determine whether *other laws or rules* . . . prohibit or otherwise restrict the proposed conduct.").

C. If the Rule of Necessity does not apply, Recorder Kevin Carden must also be disqualified because he is a fact witness.

In the event that this Court determines that the Rule of Necessity does not apply, and that the currently serving councilmembers named as contestees must be disqualified, Recorder Kevin Carden must also be disqualified from participating in the election contest because he is an

essential fact witness. Indeed, Respondents called Mr. Carden to testify during the election contest, but despite being present, he refused to answer any questions. *See* Appx. 177–85.

Under longstanding judicial rules of disqualification, now codified in the West Virginia Code of Judicial Conduct, a judge "shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned, including . . . where" the judge is "likely to be a material witness in the proceeding." S*tate ex rel. E.I. Dupont De Nemours & Co. v. Hill*, 214 W. Va. 760, 764 n.6, 591 S.E.2d 318, 322 n.6 (2003) (quoting Canon 3E(1)); *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908 (2016) ("recusal required where judge 'has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding'") (quoting 28 U.S.C. § 455(b)(3)).

The Respondents sought Mr. Carden's testimony on a number of relevant issues about which he had unique, first-hand knowledge. *See* Appx. 178–79, 183–84. For example, Nikki Painter testified that it was Mr. Carden who first brought the alleged voter registration errors to her attention, and that Mr. Carden had substantial extra-judicial conversations with Ms. Painter on this critical subject. *See* Appx. 091, 095–96. Perhaps more importantly, the Petitioners' own testimony at trial established that Mr. Carden has unique knowledge concerning when and how the Petitioners' requests for recount and required bond were received, matters essential to determining whether the Petitioners even have standing to bring this contest, *infra* Part III. Appx. 165–68, 173–76. Mr. Carden's refusal to testify concerning these issues deprived Respondents of the ability to ascertain whether in addition to Ms. Case, Ms. McGee had standing to bring this contest in the first place.

III. Petitioner Nancy Case lacks standing.

Petitioner Case lacked standing to bring and prosecute this election contest, and now lacks standing to appeal it, because she failed to present evidence that she made a formal request for a recount, accompanied by the required bond, within 48 hours of the declaration of election by the Board of Canvassers. Under the plain text of West Virginia Code § 3-6-9, the demand for a recount must be made within 48 hours after the declaration of election. *Id*. § 3-6-9(a)(8)(A). In addition, "[e]very candidate who demands a recount shall be requested to furnish bond in a reasonable amount. . . ." *Id*. § 3-6-9(h). It is well-settled that "[t]he burden for establishing standing is on the plaintiff." *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017).

A proper request for a recount is a strict legal prerequisite for filing and prosecuting an election contest under West Virginia Code § 3-7-6. *See* Syl. Pt. 5, in part, *Miller v. Cty. Comm'n of Boone Cty.*, 208 W. Va. 263, 265, 539 S.E.2d 770, 772 (2000) ("Where a candidate seeks to contest specific ballots cast in an election pursuant to the provisions of West Virginia Code § 3–7–6 (1999), [s]he must first demand that the Board of Canvassers conduct a recount of the ballots pursuant to the provisions of West Virginia Code § 3–6–9 (1999)."). In *Miller*, the Supreme Court of Appeals affirmed the circuit court's decision to issue a writ of prohibition halting the County Commission from hearing an election contest where the contester had failed to timely request a recount in accordance with West Virginia Code § 3-6-9. *See Miller*, 208 W. Va. at 269–70, 539 S.E.2d at 776–77; *see also id.* ("The Appellant's failure to demand a recount in a timely fashion precluded his contest of the election on the issue of the validity of the ballots under the provisions of West Virginia Code § 3–7–6.").

Here, there is no evidence in the record that Petitioner Case either submitted a proper request for recount or furnished the required bond—both of which are legal requirements for bringing an election contest. Those are the factual findings of the trial court and nothing in the record suggests that they are "clearly wrong." *See* Appx. 005. Indeed, Petitioner Case herself admitted that she "personally did not" submit the bond as required by statute. *See* Appx. 166; W. Va. Code § 3-6-9(h) ("*Every candidate* who demands a recount shall be requested to furnish bond in a reasonable amount. . . .") (emphasis added). That admission, combined with the lack of any evidence from Petitioner Case that she actually made a recount demand and her otherwise evasive testimony, is enough to support the trial court's decision concluding that Petitioner Case lacks standing in this election contest proceeding.

Accordingly, Petitioner Case is not entitled to any relief in this election contest, regardless of the decision on whether any of the provisional ballots should hereafter be counted. *See Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 95, 576 S.E.2d 807, 822 (2002) ("[S]tanding to sue—the real party in interest requirement—goes to the existence of a cause of action, i.e., whether the plaintiff has a right to relief.") (citation omitted).

CONCLUSION

The decision of the Town Council for the Corporation of Harpers Ferry, sitting as the duly authorized election contest trial court, should be affirmed.

Respectfully submitted,

HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
MARJORIE FLINN YOST, and
BARBARA HUMES,

By counsel:

/s/ J. Zak Ritchie

J. Zak Ritchie (WVSB #11705)
Ryan McCune Donovan (WVSB #11660)
HISSAM FORMAN DONOVAN RITCHIE PLLC
P.O. Box 3983
Charleston, WV 25339
681-265-3802 *office*
304-982-8056 *fax*
zritchie@hfdrlaw.com
rdonovan@hfdrlaw.com

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

NANCY SINGLETON CASE and
DEBORAH A. MCGEE,

Individual Contestors Below, Petitioners,

v. **Civil Action No. 19-P-136**

HARDWICK SMITH JOHNSON,
CHARLOTTE WARD THOMPSON,
CHRISTIAN PECHUEKONIS,
MARJORIE FLINN YOST,
BARBARA HUMES,
JAY PREMACK, and
CORPORATION OF HARPERS FERRY,

Individual Contestees Below, Respondents.

CERTIFICATE OF SERVICE

I, J. Zak Ritchie, do hereby certify that on October 22, 2019, a true and correct copy of the foregoing was served through the electronic filing system on all registered users.

/s/ J. Zak Ritchie
J. Zak Ritchie (WVSB #11705)